

McKenna Long
McKenna Long
& Aldridge^{LLP}
Attorneys at Law

Albany
Atlanta
Brussels
Denver
Los Angeles

1900 K Street, NW • Washington, DC 20006
Tel: 202.496.7500 • Fax: 202.496.7756
www.mckennalong.com

New York
Philadelphia
San Diego
San Francisco
Washington, DC

January 5, 2010

FRANK M. RAPOPORT
(202) 496-7406

EMAIL ADDRESS
frapoport@mckennalong.com

VIA E-MAIL injord@utah.gov and HAND DELIVERY

Utah Department of Transportation
Attn: John Njord, Executive Director
4501 South 2700 West, Box 148220
Salt Lake City, UT 84119

**Re: Notice of Protest Regarding Award
I-15 Corridor Expansion
Project No. MP-I15-6(178)245**

Dear Mr. Njord:

FSZ hereby renews its bid protest previously lodged with UDOT, and with the benefit of new documentation, sets forth with specificity the patent and repeated violations of both state and federal law. The Selection Review Committee (SRC), as shown below, made erroneous and unsupported changes to the underlying proposal evaluation, often without a cogent rationale and directly contrary to the evaluation factors and value statements contained in the Instructions to Proposers (ITP). This presents a violation of controlling law. The guidelines, law, and precedent pertaining to this procurement include the ITP, the Evaluation and Selection Manual, the Utah Procurement Code, the Federal Acquisition Regulations (FAR), DOT Procurement Regulations found at 23 CFR and 48 CFR – incorporated into this procurement and dictating strict adherence to certain source selection procedures that were not followed here –, and the related case law on bid protests derived from Government Accountability Office (GAO) decisions.

Correspondingly, as demonstrated by Stan Burn's (while a participant at a meeting with UDOT and members of the FSZ team on December 29, 2009) lack of understanding of the underlying procurement process, the Evaluation Oversight Team failed utterly in its duty to provide "an independent observation of the evaluation and selection process, comparing it to this manual and the ITP."

The indisputable facts, when analyzed below against the controlling law, call for a swift reversal of this procurement selection and compel a directed award to FSZ.

What follows is a summary of the evaluation elements in which the Selection Recommendation Committee (SRC) violated procurement procedures based on two legal arguments: the first argument being that the SRC's evaluation was inconsistent with the ITP evaluation factors and value statements; and the second argument being that the SRC did not sufficiently document a rational basis for changing the evaluation team's (ET's) evaluations. Following the facts, which will reference one of these two legal arguments, is a detailed discussion of the relevant law and GAO decisions that support a finding of impropriety in the SRC's evaluation.

For convenience, the evaluation elements are broken down into the various sections of the project along with the sub-criteria of each section in the same order as the Final Recommendation Report prepared by the SRC, dated December 7, 2009.

Project Definition

High Criteria Elements

- The ET determined that the FSZ-proposed improvements to the University Parkway I/C, Sandhill Road I/S complex significantly outweigh PRC's proposed improvements to those intersections. The SRC, however, indicated that "a disproportionate emphasis was placed on the value of this single interchange in relation to the overall goals".

One of the main ITP value statements for this discipline, however, as outlined in ITP Section 4.5.1.1., states in part: "Accepted improvements will focus on relieving present and future mainline I-15 congestion and on improving the movement of traffic through interchanges." De-rating FSZ on this interchange on grounds that disproportionate emphasis was placed on this I/C is inconsistent with the ITP's value statement. FSZ also provided a "grade separation" I/C which is consistent with the requirements of the ITP. This negative adjustment to FSZ's score is contrary to the ITP value statement and violates the first legal argument.

- The FSZ-proposed improvements to the Provo Center Street I/C provide a better solution for Draper Lane access to Provo Center Street than the improvements proposed by PRC, while still providing interchange LOS C vs. the required D. The ET summarized their evaluation of the Provo I/C by stating in part: "Also, the FSZ solutions for minor solutions.... are better than the solution proposed by PRC." Further, the ET highlighted as a Minor Weakness for PRC the fact that their solution required a Design Exception for reduced speed on Provo Center Street to 30mph. Despite this evaluation, the SRC concluded: "these Provo Center Street Interchange solutions were equal." That conclusion is without documented justification and violates the second legal argument.
- Each proposer should have been scored on how many design exceptions they will require in order to meet their design. ITP Section 4.5.1 states in part: "The Proposal will be evaluated to determine its ability to meet or exceed the Project goals, values and requirements. The number and type of Design Exceptions and Additional Exceptions required to implement the Work will also be considered." When it determined that the

FSZ and PRC Teams would provide an “equal” I/C at Provo Center Street, the SRC ignored the ITP considerations, violating the first legal argument.

- The ET determined that the investment in an additional auxiliary lane NB between Orem 1600 N and Pleasant Grove Blvd impacts significantly more traffic, and has a greater positive influence on relieving mainline congestion, than the location chosen by PRC. The implementation of this additional investment at this location includes the commitment to provide a wider mainline bridge and lengthen two bridges crossing I-15, thus simplifying future improvements. Despite these facts, the SRC determined the difference between the two proposals was “not as significant as recommended by the ET.” Without providing justification for the difference of evaluation with the ET, the SRC violated the second legal argument below.

Furthermore, Section 4.5.1.1. of the ITP identifies as the following value statement: “It is important, however, to maintain the future ability to further expand the freeway, with limited rework.” When the SRC, ignoring FSZ’s solution with regards to the auxiliary lane, determined that the separation between the two proposers was “not as significant as recommended by the ET,” it also violated the first legal argument below.

- Regarding the positive impact of the construction of the Express Lane direct accesses I/C’s at Orem 400 N and at approximately Orem 1400 S with Park & Ride (P&R) access to Sandhill Road, the ET stated in detail that FSZ’s solution would “also encourage greater utilization of the express lane and the ETC system which will reduce demand on the mainline general purpose lanes extending the life of the corridor. Based on the fact that other P&R lots in the corridor are fully utilized, the P&R lot associated with this proposal will facilitate positive mobility behavior changes that are beneficial to I-15 mainline performance. The risk of not being able to implement one or both I/C is assessed as low to medium-low based on comments from FHWA regarding precedence and retroflexion on the I-15 EIS.”

In spite of this evaluation, the SRC de-rated FSZ’s proposal by indicating that the HOV ramps proposed by FSZ had not received necessary third party approvals. The SRC ignored the ET’s evaluation, wherein the risk was low, and further ignored one of the main value statements of the ITP, which provides: “Department values creative, innovative solutions that address mainline congestion, ramp queuing and aging infrastructure within the corridor.” The SRC’s evaluation in this instance, therefore, violates both legal arguments.

Despite “significant differences” identified by the ET between the proposals, the SRC concluded, without sufficient, rational justification, that “the Evaluation Team placed a disproportionate emphasis on the value of this single interchange to the I-15 corridor” and “the separation between these two proposers was not as significant as recommended by the Evaluation Team.” The evaluation violated the second legal argument below.

- PRC's extension of the three mainline lanes south of Spanish Fork Main Street was deemed to have value by the SRC and contributed to the SRC's awarding of additional points to PRC.

UDOT, however, specifically advised FSZ that lane-extension south of Spanish Fork had "no value" (reference meeting minutes from August 18 and October 6). Further, the ITP, at 1.1.2.1 and 4.5.1.1.2, speaks to lengthening the project *as far as* Spanish Fork, but no mention is made of the possibility of extending beyond Spanish Fork.

Two legal issues are raised by this evaluation. The first issue relates to the first legal argument described below: that the SRC's evaluation did not comply with the requirements of the ITP – it awarded points for scope of work that is outside of the scope defined by the ITP factors.

The second issue raised by this evaluation is unique and is therefore not discussed in the Legal Arguments section below but simply summarized here. That argument is that FSZ was misled by UDOT into not lengthening the project beyond Spanish Fork. As a result, PRC was evaluated more highly in comparison to FSZ: if both proposals had included the extension, PRC would not have been awarded the additional points. The evaluation should be reassessed based on this error. See, for example, the Boeing-Tanker protest, Comp. Gen Dec. B-311344 *et al.*, June 18, 2008, where the Comptroller General sustained the protest because the agency conducted misleading discussions with Boeing – leading the company to believe that it had fully satisfied a solicitation objective; later determining that the objective was only partially satisfied; and failing to advise Boeing of that fact while continuing to conduct discussions with the awardee relating to its satisfaction of the same objective. From that case: "It is a fundamental precept of negotiated procurements that discussions, when conducted, must be meaningful, equitable, and not misleading. See 10 U.S.C. § 2305(b)(4)(A)(i); *AT&T Corp.*, B-299542.3, B-299542.4, Nov. 16, 2007, 2008 CPD ¶ 65 at 6. Here, by informing Boeing prior to the submission of the firm's final proposal revision that it satisfied all aspects of [the solicitation], the Air Force deprived the firm of the opportunity to further address these particular requirements. See *AT&T Corp.*, *supra*, at 12; see also, *Bank of Am.*, B-287608, B-287608.2, July 26, 2001, 2001 CPD ¶ 137 at 13."

UDOT violated procurement regulations and requirements for meaningful discussions by providing FSZ with inaccurate information. FSZ relied on that information to its detriment and, more precisely, to the benefit of its competitor.

The SRC awarded FSZ a score only 3 points higher than PRC in this evaluation category, despite ET findings that there was a "significant difference" between the FSZ's and PRC's proposals. SRC's de-rating of the significant differences, yielding only a 3-point spread, is not supported by the record.

Medium Criteria Elements

- The FSZ proposed improvements to the I-15 and I-15 corridor operations from permanent MOT investments in Geneva Road. The SRC explained that “Benefits of the Geneva Road improvements were considered primarily as part of the FSZ MOT strategy.” As a result, the SRC did not give credit to FSZ for this concept or even de-rated FSZ’s proposal as a result. The ET, however, described the value the Geneva improvements bring to the corridor: “Including the Geneva Road improvements as part of this project will help ensure that the planned benefits to I-15 actually occur sooner than later;” and “Permanent improvements to Geneva Road between University Parkway and Lindon 2005 provided during MOT phases of I-15 will provide permanent operational benefits to I-15 mainline operations” including a “7 lane bridge over the RR (no follow-on Geneva Rd project required)” and “Scab widening of pavement along existing Geneva will provide a 5 lane roadway section from University Parkway to Lindon 200 S.”

The SRC ignored this evaluation by the ET and only recognized these improvements as an MOT strategy. As a result, the SRC’s evaluation conflicts with a number of the ITP value statements requiring the proposer to “Provide the highest value for the budget” and “Accepted improvements will focus on relieving present and future mainline I-15 congestion.” Thus, the SRC violated the first legal argument below.

- FSZ proposed nine more intersection-improvements than PRC. This fact is largely ignored in the SRC’s evaluation.

The value statement for the “Structures” item in the ITP identifies: “bridges and box culverts that will be replaced or rehabilitated/widened within the proposed Project limits; for new structures note the structure type and foundation type; assessment of maintenance cost and ease of re-decking, inspection, and maintenance; for rehabilitated structures, identify members that will remain in place and the estimated remaining service life of the bridge (20 years minimum).”

The value statement went on to indicate: “The Department values pavements and bridges that meet high quality and durability the Department values that structurally deficient and/or functionally obsolete bridges and walls, drainage pipe and other elements will be replaced rather than repaired. This will assure the appropriate design life for the Project is achieved and will minimize the need for future traffic disruptions due to routine maintenance standards that will minimize maintenance needs throughout their respective design lives.”

The ET compared FSZ and PRC in this category: “High use of concrete bridges for replacement and new bridges reduces the need for future maintenance. FSZ uses 2 steel bridges. PRC uses 13 steel bridges; FSZ replaced 54 bridges, PRC replaced 52; FSZ is reconstructing Lehi Main St. Interchange and will provide brand new structure based on latest seismic criteria; PRC is widening only the bridge at Lehi Interchange; FSZ is Reconstructing U5-6 interchange and replacing all existing structures and adding one new structure for I-15 NIB to US-6 E/B over SF Main; PRC is noted as only

reconstructing US-6 Interchange; FSZ utilizes 95% of the combined new and existing bridges that are concrete superstructures having the least long term maintenance costs/requirements; PRC uses 79% of the combined new and existing bridges that are concrete superstructures having the least long-term maintenance costs/requirements.”

FSZ has no minor weaknesses listed in this “Structures” category whereas the ET goes into length in pointing out its concern with the foundation approach that PRC has taken on 2 two-span bridges: “Contractor proposes a seismic design method called ‘Foundation Rocking’ on 2 two-span bridges. Seismic forces are dissipated by allowing the footings to ‘rock’ or uplift. Foundation rocking of spread footings during seismic event can lead to significant soil displacements and may require more repairs and take longer to open back up to traffic. This is not common practice at UDOT and is something of an unknown here. It is, however, allowed by AASHTO with the owner’s approval and AASHTO recommends it only be used on non-essential bridges. Because it is not a common strategy we have limited experience designing and reviewing this approach. There are also concerns about inspecting these post-earthquake. Spread footings are not typically desired in higher seismic areas.”

Despite the ET’s extensive evaluation as described above, the SRC focused its attention on the Pavement sub-header in this criteria element. In justifying an overturning of the ET’s evaluation, the SRC “placed a greater value on this significant strength than the Evaluation Team” and ranked PRC higher. The SRC’s explanation was lacking when compared to the details provided by the ET. As a result, the SRC violated the second legal argument.

In this evaluation category, the SRC downward adjusted the ET’s rating of FSZ’s proposal as “slightly better” than the PRC’s proposal to not-as-good as PRC’s – awarding PRC five points higher than FSZ. That point adjustment is not supported by the record.

Low Criteria Elements

- In this criteria element, the ET stressed the “noticeable difference” between the proposers. The SRC apparently agreed with the ET’s evaluation in this instance and “scored accordingly,” yet the SRC only awarded a two point difference between FSZ and PRC. Two points does not capture a “noticeable difference” and the record does not support such a minor differentiation between the two proposals. In the Medium Criteria Element above, the SRC awarded PRC five points over FSZ when PRC was adjusted from “slightly” worse than FSZ to (no adjective) better than FSZ. The SRC’s awarding of points is inconsistent in this regard.
- The ET indicated, as a minor strength for the PRC Team in this criteria element, that they provided a five-year warrantee stating: Provide five year warranty that conforms to the terms and requirements of RFP Part 1, Section 24; Note this warranty does not cover normal wear and tear items, such as striping. Estimate that in the Department will realize approximately \$5 million value from this warranty. The unused portion of the warranty will be returned to the proposer. Commits to show amount in escrow account.

FSZ provided an additional \$50-\$90 million in capital improvements to the I-15 corridor that are all in alignment with the Department's Goals and Values under this Project Definition section. When members of the I-15 CORE team were asked in the December 15 and 18 meetings why the Department had not taken this into consideration, the reply was that they (The CORE Team) had no way of analyzing the value of money brought above and beyond the requirements, ("when the bucket is full, we have no way of measuring how you overflowed"). Since the ET placed a \$5 million price tag on PRC's five-year warrantee, it would seem that an evaluation could be made on the additional scope that FSZ "brought-to-the-table." This is another instance where the proposals were not evaluated consistently and not evaluated in accordance with the evaluation factors, which specifically sought a proposal that demonstrates the "ability to meet or exceed Project goals, values, and requirements," and the ability to "implement as many improvements as possible" and to offer "creative, innovative solutions." This violates the first legal argument below.

Schedule

High Criteria Elements

- The ET ranked FSZ first in this element with an "exceptional" adjectival rating. The ET evaluated FSZ's proposal as "significantly higher than the other two Proposers." PRC, ranked second, received an adjectival rating of "very good."

The SRC's evaluation of this element begins: "In general, the SRC agreed with the Evaluation Team's order of ranking of the proposals." In the next line, however, the SRC goes on to state: "PRC was rated as Very Good by the evaluation team. The SRC disagrees with this rating," and "the SRC established a rating of Exceptional for PRC."

This adjustment – from "very good" to "exceptional" was made by the SRC even though the ET was very critical of the PRC proposal. The ET emphatically stated about the PRC proposal: "unlike the other two proposers, they did so at the expense of the Department's other identified values, specifically, balancing the early Project delivery with providing useable segments that improve regional mobility."

In contrast, "the SRC disagreed with this rating, because PRC proposed a schedule that completed the project nearly 2 years earlier than required. We believed this commitment strongly met or exceeded the project goals, values, and requirements. The SRC placed a greater value on this significant strength than the Evaluation Team."

The ITP Evaluation Criteria under Schedule-HIGH has only two categories: (1) "Early Completion"- Completing the Project quickly and efficiently; and (2) "Usable Segments" – Completion of Segments that improve regional mobility and provide major regional connectivity. In FSZ's December 15 meeting with UDOT, UDOT representative (Dal Hawkes) indicated that the ET came up with a "clever" way to measure the term "Quickly and Efficiently." The ET looked at "months of impact per mile." The representative noted that FSZ was far superior in its approach as it relates to this

evaluation concept to the other proposers. This was mainly due to FSZ's segmenting of the job and consistency with the outline for the goals and values for the project.

Despite the ITP value statements in this category, however, the SRC ignored efficiency and impacts per mile and instead focused entirely on PRC's approach to completing the project two years early. This fact was sufficient to adjust PRC's rating from "very good" to "exceptional." *However*, per the ITP, finishing-early should *not* have been evaluated in this High Criteria Element. Rather, it should have been evaluated as part of the Schedule-Low Criteria Element: "Department project management cost savings as a result of a shorter Project completion schedule," where, indeed, PRC *was* fairly evaluated, because of the early finish, 15 points higher than FSZ.

By adjusting PRC upwards from "very good" to "exceptional," the SRC gave PRC at least six additional points.

This adjustment did not conform to the ITP evaluation factors, and consequently violated the first legal argument below.

Low Criteria Element

- PRC received an adjectival rating of "exceptional" in this element, and FSZ received a rating of "very good." The ET indicated that the differences in the rankings between the proposals were "*minor*" and the SRC "agreed with the Evaluation Team recommendations and has scored accordingly." However, for a "*minor*" difference in the evaluations, the SRC awarded PRC 15 points more than FSZ. Compare this 15 point spread to the two and three point spreads for minor differences in the criteria elements above. There is no consistency in the SRC's ratings. The ratings are therefore irrational and arbitrary and in violation of the first legal argument below.

Evaluating the teams against the factors and value statements for "Schedule" in the ITP, the ET determined that FSZ was "exceptional, the most efficient, delivering usable portions of the Project quickly, and committing to a schedule with additional segments and start dates above and beyond the contract and proposal requirements." In contrast, the ET concluded that the PRC proposal was "very good," and delivered the project the quickest, resulting in lower UDOT management costs. However, the ET again emphasized that PRC's proposal schedule would result in "working along the entire project the longest" and the schedule did not commit to providing more than one useable portion early" and "did not commit to additional delivery dates." Despite these significant concerns raised about the PRC's proposal in the Schedule section, the SRC's scoring resulted in a total of 16.3 factored points for FSZ compared to 16.0 factored points for PRC, a difference of only .3. This scoring is arbitrary and not supported by the record. It violated the first legal argument below.

Maintenance of Traffic (MOT)

High Criteria Elements

- In this element, the ET ranked PRC above FSZ by a “significant difference.” The SRC stated in its recommendation that it “agreed with the Evaluation Team recommendation and has scored accordingly.” As a result, the SRC awarded PRC 15 more points than FSZ in this element. Compare this 15 point “significant difference” in favor of PRC with the three point “significant difference” in favor of FSZ in the Project Definition-High Criteria Element, the two point “noticeable difference” in favor of FSZ in the Project Definition-Low Criteria Element, and the four point “significantly higher” evaluation in favor of FSZ in the Schedule-High Criteria Element. This inconsistency in point scoring is arbitrary and irrational and in violation of the first legal argument below.
- In this category, UDOT recognizes two evaluation criteria: (1) Duration of Closures – Duration of all long term closure of lane(s) on mainline, ramps, cross streets, and other roads, as detailed on Form F; and (2) Regional Mobility - Quality of both AM and PM peak hour regional mobility based on long term closures or openings of mainline lanes, in each major MOT phase, over the life of the Project. Regional mobility is defined as the impact of construction activities on the following measures of effectiveness from the Paramics models: number of vehicles blocked from entering the model; travel times between select origins and destinations; confirmation that the Paramics models are representative of the scheduled major long term closures and openings of mainline lanes.

UDOT does not distinguish which one of these two criteria has more “weight” than the other. While it is recognized that Form F is an integral part of the first criteria and PRC ranked first in this category, it is important to recognize what the ET diarized for PRC in the regional mobility evaluation bullet: PRC violated a modeling requirement by adjusting vehicle release rates for 3 PM scenarios (configurations 9-11). Making these modifications invalidates the calibration of the models, and was specifically not allowed. There was no explanation provided. These three coding violations were not included in any or the other 19 models (AM and PM) submitted by PRC. PRC changed release loading rates at some zones (222,130,226,332 and 333) in Configurations 9-11 PM peak models. This change violates directions in the Instructions on the Application or models. This resulted in a very high level of blocking, allowing fewer trips into the model, causing significant increases in travel times as the project is completed. The result of the above violation is less than adequate assessment of operations in the University Avenue area.

Since the SRC only references the Form-F significant strength as its reason for substantiating the Exceptional Rating and thus awarding 100 points to PRC in this category, but fails to address the violations in the Regional Mobility evaluation criteria in the same category, the SRC did not evaluate the proposals consistent with the ITP evaluation factors and violates the first legal argument below.

Medium Criteria Elements

- FSZ was ranked best by the ET with an “exceptional” rating. PRC was ranked third with a rating of “good.” The SRC states initially: “in general the SRC agreed with the Evaluation Team’s recommendations, with the following exception...” The SRC then

states that it “determined the information provided in the strengths and weaknesses supported a rating of Very Good for PRC, which differed from the Evaluation Team recommendation of Good.”

The SRC not only moved PRC from “good” to “very good,” it further awarded PRC the highest allowable points – 84 – under the “very good” category! The highest point scoring available in the “good” category is 69 points. This change in adjectival rating category adjustment benefited PRC with at least 15 additional points. FSZ, on the other hand, was given an “exceptional” rating, but only awarded 89 points, which is on the low end of the scale. The resulting point difference was only five points.

The SRC explained that PRC’s “two significant strengths were offset by only minor weaknesses.” (The two “significant strengths” that the SRC bases its reasoning on is, in reality, one “significant strengths” and one “minor strength” – the evaluation was in error.) The ET also noted PRC’s “minor weakness:” PRC provided very little detail regarding the relative phasing of construction and the ET was prevented from performing a true assessment of the logic of PRC’s approach to delivering the project. The fact that the SRC adjusted PRC to the highest-end of the next higher adjectival rating without recognizing the weakness indicated by the ET – that they “could not perform a true assessment of the logic,” points to the fact that the SRC did not evaluate the proposals in a manner consistent with the evaluation scheme and violated the first legal argument below.

Low Criteria Elements

- In this element, PRC was ranked first by the ET without explanation in its narrative report. The ET ranked TTC above FSZ with a “moderate difference.” The SRC stated in its recommendation that it “agrees with the Evaluation Team for the FSZ [and TTC proposals] and scored accordingly. However, justification was not given in the Evaluation Team’s letter for the Exceptional rating given to the PRC proposal. The SRC reviewed the strengths and weaknesses identified by the Evaluation Team, and the SRC determined the weaknesses were very limited and were significantly outweighed by significant strengths. Therefore, an Exceptional rating was warranted.” Then the SRC awarded PRC 12 points more than FSZ.

In this category, UDOT recognizes two evaluation criteria: (1) Detour Plan - Detour plan concept logic and complexity; and (2) TMP – Completeness of Draft TMP in providing commitments and direction regarding: process to produce MDT Plans, including the following phases of a MDT plan: development (meeting contract requirements), implementation, monitoring, refinement, and maintenance; strategies to maximize, monitor, and maintain regional mobility; strategies to maintain access to residences and local businesses; and strategies to incorporate temporary and/or permanent ATMS facilities into traffic management during construction, including interface with TDe personnel and software. UDOT does not distinguish which one of these two bullets has more “weight” than the other.

The SRC indicates that it reviewed the PRC's strengths and weaknesses, however item 1- Detour Plan- had no significant strengths, one minor strength, and four minor weaknesses. Item 2- TMP- had five significant strengths, nine minor strengths, and no weaknesses. Because it is uncertain as to how to determine which item has more weight than the other, the SRC did not evaluate consistent with the ITP evaluation factors and violated the first legal argument below.

In total for this MOT factor, the ET concluded that there was a "significant difference" between the PRC proposal and the FSZ proposal in the High Criteria Element. The SRC agreed and, unlike other elements, awarded PRC with a 15 point differential. In the Medium Criteria Element, the SRC ignored the ET and not only changed the adjectival rating, but awarded PRC the highest number of points available under that rating. In the Low Criteria Element, SRC agreed with the ET's conclusion and rewarded PRC with a 12 point differential. Without a rational basis or sufficient justification, the SRC scored this section giving a total of 18.9 factored points to PRC compared to 17.2 factored points to FSZ, a difference of 1.7 factored points which is higher than the difference in any other evaluation category. The difference is not justified by the record.

The "point" discussions above refer to relatively minor point spreads: three points here, two points there, fifteen points. But consider the fact that PRC's proposal was awarded only 27 points out of 900 total possible points (3% and 1 point factored!) more than FSZ's, and FSZ's points were higher in two of the three evaluation categories, including the most important and heavily weighted – the Project Definition category. The point difference is entirely (and more) attributable to adjustments that the SRC made to the ET's evaluation, and each one of those adjustments was either a downward adjustment for FSZ or and upward adjustment for PRC (not a single positive adjustment for FSZ). This is the source of FSZ's concern about the propriety of the SRC's evaluation and its lack of sufficient justification and support in the record.

Legal Arguments and Precedent

The FAR and Federal Decisions Governing Bid Protest Issues Govern this Protest.

Utah, like many states, does not have a body of case law specifically addressing bid protest issues. Other states in similar circumstances have utilized federal case law and administrative decisions. *New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 696 P.2d 185, 191 (1985) ("In the absence of controlling state authority, state courts look for guidance in public contract law to the federal court of claims and federal boards of contract appeals"); *Powder Horn Constructors, Inc. v. City of Florence*, 754 P.2d 356 (1988); *Murdock & Sons Const., Inc. v. Goheen General Const., Inc.*, 461 F.3d 837 (7th Cir. 2006) (considering federal procurement precedent in finding a viable constructive acceleration claim under Indiana law).

Consideration of federal procurement decisions is appropriate in this case, in addition to the obvious ITP and Evaluation and Selection Manual requirements that are controlling. Indeed, the beginning of Utah's Administrative Code characterizes it as "equivalent to the Code of Federal Regulations." See section entitled *About the Administrative Code*. Under Utah's regulatory scheme governing UDOT, that agency adopted rule R907-66-1 *et seq.* which

incorporates the provisions of the FAR contained in 48 CFR Part 1 for Federal-Aid transportation projects. The same rule goes on to adopt the FAR contracting cost principles and procedures for Utah transportation projects financed solely with state funds. UDOT already looks to federal regulations as binding for certain aspects of the contracts it awards. Thus, consideration of federal decisions governing bid protest issues is appropriate.

“First Legal Argument:” The SRC’s Evaluation Was Inconsistent with the ITP Evaluation Factors and Value Statements.

In 23 CFR § 636.304(a), the Federal Highway Administration states: “You must evaluate proposals solely on the factors and subfactors specified in the solicitation.” Additionally, the FAR, at 13.305(a) and matching language in 10 U.S.C. § 2305(b)(1) and 41 U.S.C. §253(b), requires evaluations be based solely on factors specified in the solicitation. Agencies have broad discretion in this evaluation process, but evaluations must still be able to withstand scrutiny as to their reasonableness and must be made in accordance with the evaluation criteria described in the ITP. Decisions will be overturned if they do not comply with the ITP, are irrational, arbitrary, or not based on evidence in the record.

An evaluation is improper if it fails to comply with the evaluation scheme and value statements contained in the ITP. In *University of New Orleans*, 55 Comp. Gen. 1281, B-184194, 76-1 CPD ¶ 22, for example, the GAO’s Comptroller General (CG) determined an evaluation was improper because, although the solicitation stated that primary emphasis would be placed on “the effects of a particular pollutant on various environmental media,” the evaluators rated proposals strictly in terms of whether they treated each of the environmental media equally. In *Safeguard Maintenance Corp.*, Comp. Gen. Dec. B-260983.3, 96-2 CPD ¶116, the evaluation was overturned because a number of the low scores were based on noncompliance with requirements not stated in the RFP. Evaluations have been overturned where the CG determined that the evaluators failed to deduct points for certain deficiencies in the awardee’s proposal, as required by the solicitation. *T.V. Travel, Inc.*, 65 Comp. Gen. 323 B-221526.2, 86-1 CPD ¶ 172. In *HG Properties A, L.p.*, Comp. Gen. Dec. B-277572, 97-2 CPD ¶ 123, the CG determined an evaluation to be improper because it awarded the winning proposal 225 points out of the 250 points available for “efficient layout” even though the winning proposal’s layout was inconsistent with the stated requirements. In *Technology Servs. Int’l, Inc.*, Comp. Gen. Dec. B-276506, 97-2 CPD ¶ 113, the CG found the evaluation to be improper where the evaluators gave the awardee the highest rating under a significant quality control technical subfactor even though the awardee’s proposal did not satisfy the requirements of that subfactor. In *H.J. Group Ventures, Inc.*, Comp. Gen. Dec. B-246139, 92-1 CPD ¶ 203, the CG determined that the evaluators gave significant weight to a factor that was listed solely as a “general consideration” but not included in the solicitation’s list of important criteria.

The GAO’s Comptroller General (CG) has found evaluations to be irrational where evaluators significantly reduced the protester’s scores without having any reason to do so. *Programmatics, Inc.*, Comp. Gen. Dec. B-228916.2, 88-1 CPD ¶ 35. In *DynCorp*, Comp. Gen. Dec. B-232999, 89-1 CPD ¶152, the CG overruled an evaluation that found two proposals

technically equal despite the fact that the awardee's proposal contained obvious weaknesses that were not contained in the protester's proposal.

Evaluations may also be overturned if they are found to be arbitrary, in cases where offerors are not treated equally in the evaluation process. Such situations usually arise when decisions to increase or decrease points are made without rational justification.

Finally, evaluations are overturned when there is insufficient tangible evidence to support the evaluations. In *Amtec Corp.*, Comp. Gen. Dec. B-240647, 91-2 CPD ¶ 211, the CG found a "marginal" rating to be improper where the record did not contain evidence to support such a rating. In *Matrix Int'l Logistics, Inc.*, Comp. Gen. Dec. B-272388.2, 97-2 CPD ¶ 89, the evaluation was overturned because there was nothing in the record to support changing the awardee's score from "good" to "excellent." The evaluation in *Eng'g Computation, Inc.*, Comp. Gen. Dec. B-261658, 95-2 CPD ¶ 176 was overturned because the record did not contain any evidence that the protester's proposal posed performance risks. In *TRW, Inc.*, Comp. Gen. Dec. B-254045.2, 94-1 CPD ¶ 18, the final evaluation of the awardee was overturned when questions were raised by the lower-level evaluation team regarding the awardee's technical proposal. And in *Coastal Science & Eng'g, Inc.*, Comp. Gen. Dec. B-236041, 89-2 CPD ¶ 436, the CG determined that the evaluation was not substantiated by the record when the two competitors received relatively equal scores even though one was found to be "sufficiently technically superior to warrant payment of a cost premium."

"Second Legal Argument:" The SRC Did Not Sufficiently Document a Rational Basis for Changing the ET's Evaluations.

The documents provided by UDOT as recently as December 29, 2009 clearly demonstrate that the SRC did not follow the ET findings on a majority of the ET's conclusions and recommendations. From the initial review of the documents provided, which UDOT has represented are the only documents relating to the evaluation process and findings, there is no well reasoned and rational basis for a number of the adjustments made by the SRC to the ET's evaluation.

The SRC is not bound by the rankings, scores, or recommendations of the ET as long as the SRC has a *rational basis* for a differing evaluation. The CG has looked for *well reasoned and thoroughly documented* source selection authority adjustments to evaluators' scores. See *Benchmark Sec., Inc.*, Comp. Gen. Dec. B-247655.2, 93-1 CPD ¶ 133. In *Calspan Corp.*, Comp. Gen. Dec. B-258441, 95-1 CPD ¶ 28, the CG held that changes to evaluators scores must be rationally based on the knowledge of the source selection authority. The SRA must act reasonably and in a manner consistent with the evaluation scheme. *Loral Aeronautic*, Comp. Gen. Dec. B-259857.2, 95-2 CPD ¶ 213. In *Morris Knudson Corp.*, Comp. Gen. Dec. B-27073, 96-2 CPD ¶ 86, the CG found that the source selection authority's decision to disregard the evaluation scores was unreasonable because it disregarded the protester's higher evaluation score because of the perceived superior subcontract approach of the awardee; but the CG determined that the two proposals were fundamentally the same in that approach.

Many of the SRC's adjustments to the ET's evaluation, summarized in the pages above, were not "thoroughly documented," well reasoned, or rationally based on the ITP evaluation factors and value statements and should be reversed.

Conclusion

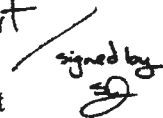
The trend is glaringly obvious as to the manner in which the SRC intervened with the rankings provided by the ET. Out of the nine potential scoring opportunities, it is apparent that the SRC intervened five times. All five interventions were to either de-rate FSZ, or improve PRC in the adjectival ratings and to increase PRC's score within the adjectival rating range. Never did the trend reverse. PRC was the sole benefactor of the SRC overruling the ET recommendations.

UDOT representatives indicated to FSZ that they estimated an approximate 12,000 manhours were spent evaluating all three proposals. The vast majority of those manhours were spent at the ET level. To disregard or overrule the recommendations of that Team so often with the same trend always in favor of the PRC Team, poses the question of why the Evaluation Oversight Team did not engage the SRC into further documentation or dialogue. The inability of this Department to carry out its duties in accordance with what is outlined in the Evaluation Manual, is in itself grounds for upholding FSZ's protest, reversing the contract award, and presenting the contract to the joint venture of Flatiron-Skanska-Zachry.

Finally and above all, the legal conclusions summarized above – that the SRC failed to evaluate the proposals in accordance with the ITP evaluation factors and the Evaluation Manual, and that the SRC failed to sufficiently document a reasonable and rational basis for deviating from the evaluation team determinations – provide sufficient support for a finding that the evaluations were not conducted properly and appropriately, federal and Utah-state provisions were violated, and the SRC evaluation should be rejected in favor of the ET evaluation.

Based on the foregoing, we respectfully request that the award to PRC be terminated and award made to FSZ.

Very truly yours,

Frank M. Rapoport
signed by 
Frank M. Rapoport

cc: Terry Poole, FSZ Joint Venture
Kent B. Scott, Babcock Scott Babcock P.C.
ReNee Spooner, Assistant Attorney General